

TCEQ DOCKET NO. _____

Gem Seal of Texas, Inc.,

Petitioner,

v.

City of Austin

Respondent.

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BEFORE THE TEXAS

COMMISSION ON

ENVIRONMENTAL QUALITY

CHIEF CLERK'S OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

PETITION FOR REVIEW OF CITY OF AUSTIN ORDINANCE NO. 20051117-070

TO: THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Pursuant to Texas Water Code § 26.177(d) and 30 T.A.C. § 86.52 *et. seq.*, Gem Seal of Texas, Inc. ("Gem Seal") files this Petition for Review of City of Austin Ordinance No. 20051117-070 (City of Austin Code of Ordinances § 6-6-1, *et. seq.*).

I.
Parties

1. Gem Seal of Texas, Inc. ("Gem Seal") is a corporation organized under the laws of the State of Texas and maintaining its principal place of business at 3111 W. Saner Ave., Dallas, Texas, 75233.
2. The City of Austin (the "City") is a Texas municipality, City Hall, 301 W. 2nd Street, Austin, Texas, 78701, 512-974-2000.

II.
Standing

3. Gem Seal is a "person" (as defined by Texas Water Code § 26.001(25)) that has been adversely affected by City of Austin Ordinance No. 20051117-070, enacted on November 17, 2005, which extends to all of the City's planning jurisdiction. A copy of the ordinance is

attached as Exhibit "A". Accordingly, pursuant to Texas Water Code § 26.177(d), Gem Seal has standing to appeal the City's ordinance within 60 days of its enactment.

III. **Jurisdiction**

4. Pursuant to § 26.177(d) of the Texas Water Code and 30 T.A.C. § 86.52 *et. seq.*, the Commission shall hear timely appeals of city ordinances relating to water pollution control and abatement and has the authority to overturn or modify such ordinances.

IV. **Summary of Facts**

5. On November, 17, 2005, the Austin City Council enacted Ordinance No. 20051117-070 banning the use and sale of coal tar-based sealants within its planning jurisdiction.

6. Gem Seal is the manufacturer of coal tar-based sealants, which are applied to asphalt surfaces to impede the deterioration and degradation of asphalt pavement. Coal tar-based sealants have been used throughout the State of Texas and United States for more than 25 years. It is estimated that 20,000 tons of coal tar-based sealants are applied to asphalt pavements in Texas every year.

7. All asphalt sealants contain polycyclic aromatic hydrocarbons ("PAHs"), regardless of their derivation. PAHs also are found in a variety of materials associated with urbanization; including vehicle exhaust, lubricating oils, gasoline, tire particles, and erosion of street materials, including asphalt itself. They are also found in asphalt roofing products including shingles; remains from forest fires, brush and tree burns and charcoal grilling; medicines; cosmetics; plastics; synthetic fabrics and clothing, among countless other materials.

8. In the Spring of 2003, PAHs were detected in Barton Creek in Austin. After conducting a study in conjunction with the United States Geological Survey ("USGS"), the City concluded

that the PAHs in Barton Creek were primarily attributable to coal tar-based sealants washed off neighboring parking lots by rainwater.

9. In response to the City's concerns, the Commission conducted an analysis of PAHs in Barton Creek in April 2003. The Commission found in May 2003 that the PAHs present in the sediments of Barton Creek "do not pose an imminent human health risk. In reviewing the soil and sediment data collectively, it appears the extent of PAH contamination is relatively limited, *i.e.* the PAHs are not carried far downstream or are quickly diluted." *TCEQ report of Barton Springs Pool and Barton Creek Area Investigation, May 29, 2003, ¶ 8.*

V.

Summary of Argument

10. Austin's Ordinance No. 20051117-070 is arbitrary, inefficient, unreasonable, and/or ineffective for the purposes for which it was enacted. The Ordinance was enacted without first determining by reliable scientific evidence: 1) whether PAHs in Barton Creek or any other Austin waterway were attributable to any significant degree to coal tar-based sealants; 2) whether the PAHs in Barton Creek were substantially attributable to other identifiable sources associated with urbanization; 3) whether the contribution, if any, from coal tar-based asphalt sealants could be minimized by less-restrictive means short of an outright ban on its use; 4) whether there were alternate risks associated with the ban of coal tar-based sealants, including more rapid deterioration of asphalt-based sealants and degradation of asphalt pavement; and 5) whether the PAH levels in Barton Creek represented an imminent risk to human health or life, and relatedly, whether the overall PAH levels in Austin waterways were high relative to other cities. In fact, the City's own 2003 study showed that the overall contribution of PAHs in parking lots runoff potentially attributable to coal tar-based sealants was comparable to that from asphalt-based sealants. Accordingly, pursuant to § 26.177(d) of the Texas Water Code and 30

T.A.C. § 86.52, Gem Seal respectfully requests that City of Austin Ordinance No. 20051117-070 be overturned.

VI.
Persons Adversely Affected by Ordinance

11. Ordinance No. 20051117-070 adversely affects manufacturers, distributors, retailers and applicators of coal tar-based sealants, as well as property owners who desire to have coal tar-based sealants applied to asphalt surfaces on their property. Gem Seal is aware of the following specific companies that are potentially adversely affected by the Ordinance:

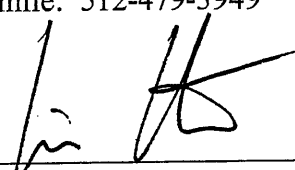
1. Gem Seal of Texas, Inc.
2. Gem Seal, Inc.
3. Gem Seal of Tennessee
4. Gem Seal of North Carolina, Inc.
5. E.A. Mariani Asphalt Co., Inc.
6. Dalton Enterprises, Inc.
7. Star, Inc.
8. Brewer Co., Inc.
9. Vance Brothers, Inc.
10. Tangent Rail Products, Inc.
11. Good Seal Products, Corp.
12. Great Lakes Coatings, Inc.
13. Hercules Sealcoat Mfg., Inc.
14. McConnell & Associates Corp.
15. Pavement Coatings, Inc.
16. Star Seal of Tennessee
17. Paving Maintenance Supply, Inc.
18. Sasco Pavement Coatings, Inc.
19. Southern Star Materials, Inc.
20. Star Seal of Florida, Inc.
21. Star Seal of New York, Inc.
22. Star Seal of Ohio, Inc.

VII.
Prayer for Relief

FOR THESE REASONS, Gem Seal respectfully requests that the Commission overturn in its entirety City of Austin Ordinance No. 20051117-070 and grant such other further relief as to which Gem Seal may show itself justly entitled.

Respectfully submitted,

BRACEWELL & GIULIANI LLP
111 Congress Avenue, Suite 2300
Austin, Texas 78701
Telephone: 512-494-3680
Facsimile: 512-479-3949



Eric Groten
State Bar No. 08548360
W. Stephen Benesh
State Bar No. 02132050

ATTORNEYS FOR GEM SEAL OF TEXAS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Gem Seal of Texas, Inc.'s Petition for Review of City of Austin Ordinance No. 20051117-070* was served on the following on this 17th day of January, 2006, via fax or hand delivery.

LaDonna Castañuela
Texas Commission on Environmental Quality
12100 Park 35 Circle
Office of Chief Clerk
Bldg. F, Room 1101
Austin, Texas 78753
Tel: (512) 239-3300
Fax: (512) 239-3311

(original and 11 copies by hand delivery)

Derek Seal
General Counsel
Texas Commission on Environmental Quality
12100 Park 35 Circle
Office of the General Counsel
Bldg. F, 4th Floor, Room 4225
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Fax: (512) 239-5533

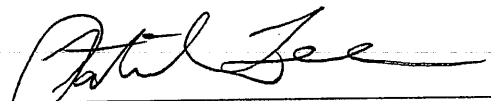
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Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
12100 Park 35 Circle
Bldg. F, 4th Floor, Room 4208
Austin, Texas 78753
Fax: (512) 239-3900

(by fax and hand delivery)

City of Austin
Legal Department
Attn: Marty Terry
301 W. 2nd Street, 4th Floor
Austin, Texas 78701
Tel: 512-974-2268

(by hand delivery)



Patriek W. Lee

EXHIBIT A

ORDINANCE NO.

AN ORDINANCE AMENDING THE CITY CODE TO ADD A NEW CHAPTER 6-6 RELATING TO COAL TAR PAVEMENT PRODUCTS, CREATING OFFENSES, AND PROVIDING PENALTIES.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Title 6 of the City Code is amended to add a new Chapter 6-6 to read:

CHAPTER 6-6. COAL TAR PAVEMENT PRODUCTS.

§ 6-6-1 DEFINITIONS.

In this chapter:

(1) **COAL TAR PAVEMENT PRODUCT** means a material that contains coal tar and is for use on an asphalt or concrete surface, including a driveway or parking area.

(2) **DIRECTOR** means the director of the Watershed Protection and Development Review Department.

§ 6-6-2 USE OF COAL TAR PAVEMENT PRODUCTS PROHIBITED.

(A) Except as provided in Section 6-6-4 (*Exemptions*), a person may not use a coal tar pavement product within the City's planning jurisdiction.

(B) A person who owns property on which a coal tar pavement product is used is presumed to have used a coal tar pavement product in violation of this section.

§ 6-6-3 SALE OF COAL TAR PAVEMENT PRODUCTS RESTRICTED.

Except as provided in Section 6-6-4 (*Exemptions*), a person may not sell a coal tar pavement product within the City's planning jurisdiction, unless:

(1) the sale is to a person who intends to use the coal tar pavement product outside the City's planning jurisdiction; and

(2) the seller requires the purchaser to complete and sign a form provided by the director that includes:

(a) the name, address, and phone number of the purchaser;

1 (b) the date of the purchase;

2 (c) the quantity of coal tar pavement product purchased;

3 (d) a statement that the coal tar pavement product will not be used
4 within the City's planning jurisdiction; and

5 (e) an affirmation by the purchaser that the information on the form is
6 correct; and

7 (3) the seller retains the completed form for a period of not less than three
8 years and allows the director to inspect or copy the form upon request.

9 **§ 6-6-4 EXEMPTIONS.**

10 The director may exempt a person from a requirement of this chapter if the director
11 determines that:

12 (1) the person is researching the effect of a coal tar pavement product on
13 the environment or is developing an alternative technology, and the use
14 of a coal tar pavement product is required for the research or
15 development; or

16 (2) a viable alternative to a coal tar pavement product is not available for the
17 intended use.

18 **§ 6-6-5 OFFENSE; PENALTY.**

19 (A) A person who violates this chapter commits a Class C misdemeanor
20 punishable by:

21 (1) a fine not to exceed \$500; or

22 (2) if the person acts with criminal negligence, a fine not to exceed \$2,000.

23 (B) Each day that a violation occurs or continues is a separate offense.

24 (C) Proof of a higher degree of culpability than criminal negligence constitutes
25 proof of criminal negligence.

1 **PART 2.** This ordinance takes effect on _____, 2005.

2 **PASSED AND APPROVED**

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6 _____, 2005

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Will Wynn
Mayor

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11 **APPROVED:** _____
12 David Allan Smith
13 City Attorney
14

ATTEST: _____
Shirley A. Brown
City Clerk